Yap Chin Chai v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–44 OF 2005
SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA
10 DECEMBER 2009

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Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(a) — Trafficking in 246.8g of methamphetamine — Possession — Whether custody and control of drugs established — Whether knowledge of drugs established — Whether invocation of presumption of trafficking premature and untenable

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Acting on information received, SP5 led a police raiding party ('the raiding party') to the appellant's house. The front door grill of the house was found padlocked from outside and SP5's calling out received no response. On forcing open the padlock and the grill, the raiding party gained access to the house. SP5 rushed up a staircase in the house to find the appellant's wife seated on a chair near the staircase and the appellant rushing out from a bedroom into a bathroom. The appellant was found standing next to the toilet bowl in the bathroom. From the toilet bowl, SP5 scooped up three plastic packets later found to contain 7g of dangerous drugs ('drugs'). SP5 thereafter conducted a search of the bedroom wherein he recovered several plastic packets in two tins. These plastic bags were later confirmed to contain 239.8g of drugs. SP5 also recovered a Malaysian passport bearing the appellant's name and a bank book in the name of the appellant's wife. The appellant was later charged on a single charge of trafficking in 246.8g of drugs, contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 38B(2) of the Act. At the close of the prosecution's case, the High Court judge found that a prima facie case had been established on, inter alia, the following reasons: (i) the house was rented by the appellant who lived there with his wife and three children; (ii) the appellant was in possession of the drugs recovered from the toilet bowl in the bathroom and the tins in the bedroom; (iii) the appellant's conduct in rushing into the bathroom and throwing the drugs into the toilet bowl on becoming aware of the raiding party's presence was consistent with knowledge and guilt. The appellant was called to enter his defence but at the close of the trial, the judge dismissed the defence on the basis that it was a mere denial. The appellant was found guilty, convicted and sentenced to death. The appellant appealed to the Court of Appeal.

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Held, allowing the appeal:

(1) SP5 never testified that he had seen the appellant carrying anything when going into the bathroom. Neither did he testify that he saw the appellant

throwing anything into the toilet bowl. Indeed, the appellant in his defence denied carrying anything into the bathroom. Thus the trial judge's finding on the appellant's conduct when throwing the drugs into the toilet bowl was a serious misdirection that had influenced the decision of the judge with regards to the element of knowledge. Without that mistaken assessment of the evidence, the trial judge surely would not have arrived at the finding of knowledge and guilt on the part of the appellant. The appellant ought to be given the benefit of doubt (see paras 19–21).

(2) The charge against the appellant was in respect of 246.8g of drugs, recovered from two sources, to wit, the toilet bowl in the bathroom (7g) and the bedroom occupied by the appellant and his wife (239.8g). Failure to establish exclusivity of possession of any part of the 246.8g by the prosecution, would be fatal to the prosecution's case (see paras 22–23).

(3) With regard to the 7g of the drugs (from the toilet bowl), there was already a serious misdirection by the judge resulting in the benefit of the doubt given to the appellant. Concerning the balance 239.8g of the drugs (from the bedroom), the prosecution had failed to prove the appellant's exclusive use and occupation of the bedroom. Further, from the evidence the prosecution had failed to establish that the appellant had custody and control of the two tins in the bedroom, which contained the 239.8g of drugs. There was also nothing in the appellant's conduct that could be construed as showing knowledge of the 239.8g of drugs in the bedroom. The appellant's solitary conduct of running into the toilet was insufficient to hold that he had possession of the drugs in the bedroom as well. The prosecution had not established beyond reasonable doubt that the appellant had possession of the impugned drugs only on inferential evidence, premised on him being the head of the house and at that relevant time, sharing the bedroom with his wife (see paras 23–24, 26 & 28).

(4) The fact that the appellant's wife's bank book was recovered from the bedroom, prima facie meant that she had access to that room as well. Due to her equal conjugal rights to the bedroom, the prosecution could equally have charged her for the offence of trafficking over the 239.8g of drugs, if not for her untimely death. It could not be said that the prosecution had proven beyond reasonable doubt that the appellant had knowledge of the drugs in the bedroom (see para 29).

(5) By the failure to establish possession, let alone affirmative possession first, the invocation of the presumption of trafficking was premature and untenable. Bearing in mind that the drugs were kept in the two tins, and passive possession was a viable defence, the prosecution was doomed to fail to establish any overt act of trafficking. The court thus should have

held, after a maximum evaluation, that the case of the prosecution had been rebutted, thus raising a reasonable doubt over it (see paras 31–32).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima, SP5 telah mengetuai satu pasukan polis yang menyerbu ('pasukan serbuan') ke rumah perayu. Gril pintu depan rumah itu didapati telah dimangga daripada luar dan panggilan SP5 tidak disambut. Setelah memecahkan mangga dan gril itu, pasukan serbuan tersebut dapat masuk ke dalam rumah itu. SP5 telah berkejar menaiki tangga dalam rumah itu dan mendapati isteri perayu sedang duduk di atas kerusi dekat tangga dan perayu tergesa-gesa keluar daripada bilik tidur ke dalam bilik air. Daripada mangkuk tandas, SP5 telah mengaup tiga bungkusan plastik yang kemudian didapati mengandungi 7g dadah berbahaya ('dadah'). SP5 selepas itu telah menjalankan pemeriksaan ke atas bilik tidur itu di mana dia menemui beberapa bungkusan plastik dalam dua tin. Beg-beg plastik tersebut kemudian disahkan mengandungi 239.8g dadah. SP5 juga menemui pasport warganegara Malaysia yang mempunyai nama perayu dan buku bank atas nama isteri perayu. Perayu kemudian telah dituduh atas satu pertuduhan pengedaran dadah sejumlah 246.8g, bertentangan dengan s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan boleh dihukum di bawah s 38B(2) Akta tersebut. Di penutup kes pendakwaan, hakim Mahkamah Tinggi mendapati bahawa kes prima facie telah dibuktikan atas, antara lain, alasan berikut: (i) rumah itu telah disewa oleh perayu yang tinggal di situ bersama isteri dan tiga orang anaknya; (ii) perayu mempunyai milikan ke atas dadah yang ditemui dari mangkuk tandas dalam bilik air dan tin-tin dalam bilik tidur; (iii) perlakuan perayu yang meluru ke dalam bilik air dan membuang dadah tersebut ke dalam mangkuk tandas setelah menyedari kehadiran pasukan serbuan tersebut adalah konsisten dengan pengetahuan dan kebersalahan. Perayu telah dipanggil untuk memasukkan pembelaannya tetapi di penutup perbicaraan, hakim telah menolak pembelaan itu atas dasar bahawa ia hanya satu penafian. Perayu telah didapati bersalah, disabit dan dihukum mati. Perayu telah merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan rayuan:

(1) SP5 tidak memberi keterangan bahawa dia melihat perayu membawa apa-apa semasa masuk ke bilik air. Dia juga tidak memberi keterangan bahawa dia melihat perayu membuang apa-apa ke dalam mangkuk tandas. Sememangnya perayu dalam pembelaannya menafikan telah membawa apa-apa ke dalam bilik air. Oleh itu penemuan hakim bicara tentang perlakuan perayu apabila membuang dadah ke dalam mangkuk tandas adalah satu salah arah serius yang telah mempengaruhi keputusan hakim berhubung elemen pengetahuan. Tanpa penilaian keterangan salah itu, hakim bicara sudah tentu tiba kepada penemuan pengetahuan

dan kebersalahan di pihak perayu. Perayu patut diberikan manfaat kesangsian (lihat perenggan 19–21).

(2) Pertuduhan terhadap perayu adalah berkaitan dadah seberat 246.8g, ditemui daripada dua sumber, iaitu mangkuk tandas di bilik air (7g) dan di bilik tidur yang didiami perayu dan isterinya (239.8g). Kegagalan membuktikan sifat eksklusif milikan mana-mana bahagian daripada 246.8g tersebut oleh pendakwaan akan memudaratkan kes pendakwaan (lihat perenggan 22–23).

(3) Berhubung dadah seberat 7g itu (dari mangkuk tandas), sudah ada salah arah serius oleh hakim yang mengakibatkan manfaat kesangsian diberikan kepada perayu. Berhubung baki 239.8g dadah itu (dari bilik tidur), pendakwaan telah gagal membuktikan perayu mengguna dan mendiami bilik tidur itu secara eksklusif. Selanjutnya, berdasarkan keterangan pendakwaan telah gagal membuktikan bahawa perayu mempunyai jagaan dan kawalan kedua-dua tin dalam bilik tidur itu, yang mengandungi 239.8g dadah. Tiada apa-apa dalam perlakuan perayu yang boleh ditafsirkan sebagai menunjukkan pengetahuan tentang 239.8g dadah dalam bilik tidur itu. Perlakuan sendiri perayu berlari ke bilik air tidak mencukupi untuk memutuskan bahawa dia mempunyai milikan dadah dalam bilik tidur itu juga. Pendakwaan tidak membuktikan melampaui keraguan munasabah bahawa perayu mempunyai milikan dadah yang dipersoalkan hanya atas keterangan berdasarkan inferens, yang berteraskannya sebagai ketua rumah dan pada masa berkaitan, berkongsi bilik tidur itu dengan isterinya (lihat perenggan 23–24, 26 & 28).

(4) Fakta bahawa buku bank isteri perayu telah ditemui dari bilik tidur itu secara prima facie bermaksud bahawa dia mempunyai akses ke bilik tersebut juga. Berdasarkan hak-hak sama rata suami isterinya terhadap bilik tidur itu, pendakwaan boleh juga menuduhnya kerana kesalahan pengedaran 239.8g dadah itu, jika bukan kerana kematiannya yang mengejut. Maka tidak boleh dikatakan bahawa pendakwaan telah membuktikan melampaui keraguan munasabah bahawa perayu mempunyai pengetahuan tentang dadah dalam bilik tidur itu (lihat perenggan 29).

(5) Oleh kerana kegagalan membuktikan milikan, bahkan milikan sebenar itu sendiri, penggunaan andaian pengedaran adalah pramatang dan tidak boleh dipertahankan. Dengan mengambilkira bahawa dadah itu telah disimpan dalam dua tin, dan milikan pasif merupakan pembelaan yang boleh berjaya, pendakwaan akan dianggap telah gagal membuktikan apa-apa perbuatan pengedaran secara terang-terangan. Mahkamah dengan itu patut memutuskan, selepas penilaian maksimum, bahawa kes pendakwaan telah dipatahkan, oleh itu menimbulkan keraguan munasabah terhadapnya (lihat perenggan 31–32).]

Notes

For cases on s 39B(1)(a), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

Cases referred to

Chan Pean Leon v PP [1956] MLJ 237 (refd)
Choo Yoke Choy v PP [1992] 2 MLJ 632, SC (refd)
Lee Chee Meng v PP [1992] 1 MLJ 322, SC (refd)
Mat v PP [1963] MLJ 263 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
Mohamed Mokhtar v PP [1972] 1 MLJ 122 (refd)
Mohd Zaiham bin Mislan v PP [2009] 6 MLJ 737, FC (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(da), (da)(xvi), 39B(1)(a)

Appeal from: Criminal Trial No 47–14 of 2000 (High Court, Shah Alam)

Gurbachan Singh s/o Bagawan Singh (Bachan & Kartar) for the appellant.
Samihah bt Rhazali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Suriyadi JCA (delivering judgment of the court):

[1] This is an appeal by the appellant against the High Court's decision on 27 April 2005 convicting him under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentencing him to death. It was pursuant to his notice of appeal that we heard this appeal.

[2] The charge reads as follows:

> Bahawa kamu, pada 24 Mac 2000, jam lebih kurang 3.00 ptg di rumah no. 60, Jalan Permata 15, Taman Yayasan, Sg. Jarom di dalam daerah Kuala Langat di dalam Negeri Selangor Darul Ehsan,telah memperedarkan dadah berbahaya, iaitu 246.8 gram Methamphetamine dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[3] The prosecution sought to prove the appellant guilty of drugs trafficking, by adducing evidence that he was in possession of 246.8g of methamphetamine at the abovementioned house, and in order to successfully establish the ingredient of trafficking, by invoking the statutory presumption under s 37(da) of the Act. The prosecution called ten witnesses to prove its case,

A and at the defence stage, the appellant elected to give evidence on oath.

FACTS OF THE CASE

B **[4]** At about 12.30pm on 24 March 2000, acting on information, SP5 C/Insp Chia Aik Chin, the raiding officer, together with seven other police officers went to Banting. Upon arrival at the targeted premise, he found the grill of the front door padlocked from outside. Behind the grill was a wooden door, which was then successfully open. He called out 'police' but failed to receive any response. He then directed D/Kpl Ghazali to force open the C padlock as it locked the grill. He thereafter unlocked the grill door. At that stage he heard movements inside the house. He rushed up the staircase leading to the first floor and saw a Chinese woman seated on a chair near the staircase. At the same time he saw a male Chinese ie the appellant rushing out of the room into a nearby bathroom. D

[5] He followed him and rushed into the bathroom and there saw the appellant standing next to the toilet bowl. He then conducted a search within sight of the appellant after directing him to stand just outside the door of the E bathroom, with D/L Jumiat standing guard. Using his hand, he scooped up three plastic packets containing white crystal like substance from the toilet bowl, and thereafter put all the recovered substance into a transparent plastic bag. He then brought the appellant and the Chinese woman into the bedroom and conducted a search. He recovered and seized a big plastic packet and two F smaller plastic packets containing crystal like substance suspected to be drugs in two tins. He then conducted a search of the room and recovered a Malaysian passport bearing the appellant's name and a Malayan Banking Bank book under the name of Lee Lai Moey.

G **[6]** SP5 then brought the appellant and that Chinese lady, by then known to be Lee Lai Maoy, together with the exhibits, to IPD Kuala Langat and handed them over to the investigating officer at about 8.45pm. SP4 ie Chong Yong Kiong, a government chemist testified that he analysed the contents of the plastic packets. The appellant never challenged the contents of the plastic H packet. After carrying out several tests SP4 found on analysis that the seven plastic packets contained 239.8g of methamphetamine. With regard to other plastic packets, on analysis, it was analysed to contain 7g of methamphetamine. Jumping the gun slightly, the 7g of methamphetamine were recovered in the toilet whilst the 239.8g in the two tins recovered from the bedroom.

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[7] After completing the analysis of the exhibits, the exhibits were returned to SP9 ie Insp Mohd Rashidi Richard Abdullah, together with the prepared report. The latter had testified that on 24 March 2000 at about 7.35pm he was informed of an arrest effected by SP5 and his raiding party. At about 8.45pm,

SP5 handed over to him the exhibits, which he had recovered together with the filed report. SP5 also had handed over to him the appellant and the Chinese woman named Lee Lai Moey.

[8] SP9 then instructed L/Kpl Aziz to take photographs of the recovered exhibits. The exhibits were, throughout, under his custody and kept under lock and key in his cabinet. He took steps to seal the big plastic bag whilst the small plastic packets were placed in an envelope, which he then sealed. He handed the exhibits to the exhibits' storekeeper where they were kept for safekeeping.

[9] SP9 then went to the house where the arrest took place, drew a sketch plan, and directed L/Kpl Aziz to take photographs. On 27 March 2000, he took the exhibits out of the exhibits' storeroom in order to send them to Bukit Aman for finger printing. He took back the exhibits on 28 March 2000 at about 11.30am. The envelope in which the exhibits were kept were sealed and thereafter handed to SP4. On 11 May 2000 at about 10am, he went to the Jabatan Kimia to retrieve the exhibits from SP4, together with the chemist report. He then returned the exhibits to the exhibits' storeroom.

[10] Based on these facts the learned judge decided that the prosecution had established a prima facie case.

THE DEFENCE'S CASE

[11] The appellant testified that he had raised a reasonable doubt in the prosecution's case. He alleged that SP5 did not see him carry anything with him when he entered the bathroom, where parts of the drugs that formed the subject matter of the charge were recovered. He alleged that the drugs were recovered with neither his assistance nor his wife. He further ventilated that there must be some evidence to show that he was guilty of the act of trafficking, of which there was none here.

[12] Further, in order to rely on the statutory presumption, it was incumbent upon the prosecution to prove that he was in actual possession of the drugs in question as per the charge. He asserted that the drugs recovered were not on the basis of an actual possession but based on 'presumed possession', merely by reason of the drugs being found in the house occupied by him.

[13] Further the prosecution had failed to prove exclusivity of possession of the said drugs, by reason of his wife being equally present and living in the same premises, and having equal access to the room where a substantial part of the drugs were recovered.

THE LEARNED JUDGE'S VIEWS

[14] By calling the defence the learned judge thus at the end of the

prosecution's case had accepted SP5's testimony. She found that there was corroboration by SP7, in that the appellant had in his possession the drugs recovered from the toilet bowl and that recovered from the two tins in the bedroom. The conduct of the appellant rushing into the bathroom and throwing some incriminating substance into the toilet bowl implied that he had knowledge of the drugs and the nature thereof.

[15] The learned judge then alluded to s 37(da) of the DDA 1952, whereby a person in possession of 50g of methamphetamine would attract the statutory presumption of trafficking. A prima facie case thus had been made out against the appellant and thus called upon him to enter his defence. At the close of the defence story, the court held that the appellant had failed to rebut the prosecution's case. The learned judge found that the house raided, was rented by the accused, and he lived there together with his wife and children. He was also the head of the family. The court accepted the fact that the evidence adduced showed that the drugs recovered were not from one place but from two areas of the said house viz the toilet and the bedroom.

[16] Apart from the above factual finding, the learned judge had also accepted that as regards the drugs found in the toilet bowl, in which the accused was seen to have hurriedly entered, was accessible to the appellant's family. The very conduct of rushing into the bathroom and throwing the drugs into the toilet bowl, on becoming aware of the police presence was consistent with knowledge and guilt. The learned judge also remarked that the officers who conducted the raid at the appellant's house were complete strangers to him and there was no suggestion of a frame up. There appeared to be no reason for the police officers who conducted the raid to single him out and pin upon him a serious charge.

[17] The learned judge concluded that the defence was one of mere denial, with him shifting the blame to his wife, who was also an occupant of the bedroom, where a substantial part of the drugs was recovered. The learned judge explained further that having established beyond reasonable doubt that the appellant had in his possession the drugs, what with the invocation of sub-s (da) of s 37 of the Act left unrebutted he thus had failed to create any reasonable doubt over the prosecution's case. The learned judge then found him guilty of the charge and convicted him. As required by law the learned judge sentenced him to death.

DECISION OF THIS PANEL

[18] At the conclusion of the appeal, this panel allowed it and set aside the High Court order. To appreciate why we made such an order, it is necessary to discuss the grounds of judgment of the learned judge especially that was

prejudicial to the appellant, which amounted to a serious misdirection. To appreciate the last remark we need to reproduce SP5's evidence as per the notes of proceedings where he said:

> Saya telah berlari menuju ke tingkat atas supaya barang-barang kes tidak dilupuskan oleh suspek. Apabila sampai di pertengahan tangga saya nampak seorang perempuan Cina sedang duduk di atas kerusi berhampiran dengan tangga. Pada masa itu juga saya nampak seorang lelaki Cina telah menuju dengan laju dari bilik masuk ke bilik air.

[19] SP5 never said he saw the appellant carrying anything when going to the bathroom, let alone throwing anything into the toilet bowl. In fact it was not the case for the prosecution that the appellant was seen throwing something into the toilet bowl. The appellant when testifying, denied carrying anything into the toilet, and was adequately so submitted by his counsel. Yet at p 141 of the *rekod rayuan* the learned judge wrote:

> I was of the view that the conduct of the accused rushing into the bathroom and *throwing some of the incriminating substance into the toilet bowl* implies that the accused had knowledge of the drugs and the nature thereof …

[20] This was an obvious error and a serious misdirection, which had influenced the decision of the learned judge as regards knowledge, bearing in mind that there was not an iota of evidence of that overt act. This misdirection led the learned judge to state:

> I am of the view that the conduct of the accused rushing into the bathroom and throwing the drugs into the toilet bowl upon becoming aware of the police presence is *very significant* and is consistent with knowledge and guilt. (Emphasis added.)

[21] Without that mistaken assessment of the evidence, the learned judge surely would not have arrived at that finding of knowledge and guilt. Not to give the benefit of the doubt in the circumstances to the appellant here would militate against established precepts.

[22] We now touch on another issue. The charge reads of trafficking 246.8g of methamphetamine. These drugs came from two sources, viz the toilet bowl and from the bedroom occupied by the appellant and his wife. For purposes of the charge, the drugs were lumped together even though found at two different places. It was incontrovertible that the drugs from the toilet bowl only amounted to 7g. If the appellant had been charged only for that meagre amount for trafficking of drugs, the presumption section under s 37(da)(xvi) of the Act would have been inapplicable, as this provision requires 50g or more in weight of methamphetamine before any invocation is permitted. By lumping

A the drugs together, now that the sum total had exceeded 50g, the presumption evidential provision thus could be exploited by the prosecution.

[23] Any failure to establish exclusivity of possession of any part of the 246.8g by the prosecution, be it over the 7g or the 239.8, would be fatal for the B prosecution's case. As regards the 7g of methamphetamine, as there was a serious misdirection by the learned judge, and with the benefit of the doubt granted to the appellant, the prosecution had started off on shaky grounds.

[24] The balance ie of 239.8g of methamphetamine, was recovered from the C bedroom inhabited by the appellant and his wife. There was no evidence to show that there was no free access to the house and bedroom in which those drugs were found; and the prosecution had never proved that the appellant had exclusive use and occupation over that room. It was small wonder that the appellant canvassed that the prosecution had not even proved custody or D control of the drugs separately, either that from the toilet or bedroom, let alone possession of any of them. In *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356 Lord Wilberforce held that 'the starting point will be that the accused had physical control of something — a package, a bottle, a container-found to contain the substance'. Here the facts do not reflect any of E the possible circumstances. He was never caught red handed with any container in hand, containing any of that deleterious substance. His misfortune was for being detained in a family home with three other members of his family in which drugs were recovered.

F **[25]** From the totality of the facts, with:

(a) the appellant seen running towards the toilet;

(b) no evidence being adduced as to his starting point;

G (c) no evidence that he ran into the bedroom towards the 239.8g of drugs when the police were there;

(d) there being easy access to everyone to the bedroom;

(e) the wife's bank book found in the bedroom;

H (f) there being two other children in the house with one being 18 years old;

(g) the wife also living in the house, and being present at the material time;

(h) that bedroom being used as the conjugal room; and

I (i) that he was never caught with the container in which the 239.8g were kept,

the wife or the 18 year old child could easily have had custody and control of the two tins which contained the drugs. These two people are real persons and not fictitious personalities conjured by the appellant in order to extricate himself from the charge. However unpleasant it sounds, and even if the court were not to accept or believe his explanation, he is not prevented from pushing the blame on them if that explanation raises a reasonable doubt as to his guilt (*Mat v Public Prosecutor* [1963] MLJ 263; *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169).

[26] Compounded to the above, the panel had occasion to pose the question as to why the appellant had attempted to dispose a smaller amount of drugs in the toilet, when it would be more beneficial to prevent that bigger amount from falling into the hands of the police. Was it possible that he did not know that the two tins contained drugs? From the totality of the evidence, the prosecution must be found to have failed to establish that the appellant had custody and control of the two tins, which contained the 239.8g of drugs.

[27] Even if the prosecution could successfully establish custody and control of the containers in which the drugs were kept, establishing the ingredient of possession, which demands knowledge, is an insurmountable task here. In *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237, Thomson J said:

> Once possession is proved then before the accused person can be convicted it is necessary in addition to prove mens rea … Here again knowledge cannot be proved by direct evidence, it can only be proved by inference from the surrounding circumstances … *There may be something in the accused's behaviour that shews knowledge, or the nature of the thing may be so obvious that it is possible to say 'he must have known what it was'* or, again in cases under the Dangerous Drugs Act, there may be a statutory presumption which fills a gap in the evidence (as the prosecution attempted to establish possession by direct evidence, the latter evidential phrase is inapplicable here as the prosecution had invoked s 37(da) of the Act to establish the ingredient of trafficking — our remarks).

[28] We are entitled to critically examine the evidence on matters involving question of facts, to determine whether the trial court was right in coming to a right factual finding or not (*Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122; *Mohd Zaiham bin Mislan v Public Prosecutor* [2009] 6 MLJ 737). Regretfully for the prosecution there was not a shred of evidence adduced by it, which could establish or even indicate that there was something in the appellant's conduct construable as showing knowledge of the 239.8g of drugs in the bedroom. The question of degree of proof required to establish evidence of conduct thus did not arise here, as he simply had not exhibited or indicated sufficiently anything to show that 'he must have known what it was'. We were unwilling to accept any suggestion that the alleged solitary conduct of running

into the toilet was sufficient to hold that he had possession of the drugs in the bedroom as well. That conduct at best could only infer knowledge of the drugs in the toilet and no more. By no account in a capital punishment case was this panel willing to accept that the prosecution had established beyond reasonable doubt that the appellant had possession of the impugned drugs only on inferential evidence, premised on him being the head of the house and at that relevant time, sharing the bedroom with his wife.

[29] The fact that in that room was recovered the wife's bank book, must prima facie mean that she had access to that room too. It was undeniable too that the wife was present in the house at the time of the raid, with the appellant being arrested in the toilet, and not in the room. In fact she was also arrested for 12 days as a suspect and remanded for some time. Due to her equal conjugal rights to the bedroom, the prosecution could equally have charged her for the offence of trafficking over the 239.8g of methamphetamine rather than the appellant, if not for her untimely death (*Lee Chee Meng v Public Prosecutor* [1992] 1 MLJ 322).

[30] We were thus satisfied that it could not be said that the prosecution had proven beyond reasonable doubt that the appellant had knowledge of the drugs in the bedroom. At the risk of repeating, with such a failure to establish knowledge over the drugs in the bedroom, to lump them together with the drugs found in the toilet was fatal to the charge. Much dissertation was focused on what happened at the toilet but sadly lacking for the bedroom, despite that location being different, and suffering different circumstances (*Choo Yoke Choy v Public Prosecutor* [1992] 2 MLJ 632).

[31] By the failure to establish possession, let alone affirmative possession *first*, the invocation of the presumption of trafficking was premature and untenable.

[32] Bearing in mind that the drugs were kept in the two tins, and passive possession being a viable defence, the prosecution was likewise doomed to fail to establish any overt act of trafficking. The prosecution could not have successfully alleged that some third party was involved, as the locked gates prima facie indicated that no one had entered the premises when the police raided the appellant's home. In fact no non-family members were arrested there. The court thus should have held, after a maximum evaluation, that the case of the prosecution had been rebutted, thus raising a reasonable doubt over it.

[33] Grounded on the above reasons we had no hesitation in concluding that the appeal warranted our interference. We thereupon allowed the appeal.

Appeal allowed.

Reported by Andrew Christopher Simon